

1 THE HONORABLE RICHARD A. JONES
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 In re Ex Parte Application of
10 BROADCOM CORPORATION, a
Delaware corporation, and AVAGO
11 TECHNOLOGIES INTERNATIONAL
SALES PTE. LIMITED, a business entity
formed under the laws of Singapore,
12

13 Applicants,

14 for an Order Pursuant to 28 U.S.C. § 1782
Granting Leave to Obtain Discovery for
15 Use in Foreign Proceedings.
16

Case No. 2:19-cv-00966-RAJ

**STIPULATION AND PROTECTIVE
ORDER**

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1 In order to expedite the flow of discovery materials, facilitate the prompt resolution of
2 disputes over confidentiality, adequately protect confidential materials, and ensure that protection
3 is afforded only to material so entitled, and for good cause shown, pursuant to Fed. R. Civ. P.
4 26(c), it is hereby ORDERED THAT:

5 **1. PURPOSE AND LIMITATIONS**

6 1.1 Protected Material designated as “CONFIDENTIAL” or “HIGHLY
7 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” under the terms of this Protective Order shall
8 be used by a Receiving Party solely for (i) the above-captioned case and all related appeals or (ii)
9 the Actions and all related appeals, or (iii) invalidity or nullity actions regarding the Patents at
10 issue in the Actions, and shall not be used directly or indirectly for any other purpose whatsoever,
11 except as expressly provided for herein and/or agreed to by the Producing Party.

12 1.2 Nothing in this Protective Order shall be construed to require a Producing Party to
13 produce or disclose information not otherwise required to be produced under the applicable rules
14 or orders of the Court. Production or disclosure of “CONFIDENTIAL” or “HIGHLY
15 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information under this Protective Order shall
16 not prejudice the right of any Producing Party making that production or disclosure to maintain
17 the trade secret status or confidentiality of that information in other contexts. Similarly, no
18 Producing Party waives any right to object on any ground to the admissibility of any of the
19 Discovery Material, or portion thereof, covered by this Protective Order. Likewise, nothing in this
20 Protective Order shall prejudice the right of any Receiving Party to challenge the confidentiality
21 designation of any materials produced and designated under this Protective Order.

22 1.3 Disclosure and discovery activity in the above-captioned case may involve
23 production of confidential, proprietary, or private information for which special protection from
24 public disclosure and from use for any purpose other than prosecuting this litigation may be
25 warranted. The parties acknowledge that this Protective Order does not confer blanket protections

1 on all disclosures or responses to discovery and that the protection it affords from public disclosure
2 and use extends only to the limited information or items that are entitled to confidential treatment
3 under the applicable legal principles. Accordingly, the Parties hereby stipulate to and petition the
4 Court to enter this Protective Order.

5 **2. DEFINITIONS**

6 2.1 Actions: *Avago Techs. Int'l Sales Pte. Ltd. v. Nintendo of Europe GmbH*, No. 2 O
7 32/18 (filed on March 14, 2018 before the Mannheim Regional Court in Germany); *Avago Techs.*
8 *Int'l Sales Pte. Ltd. v. Nintendo of Europe GmbH*, No. 2 O 35/18 (filed on March 16, 2018 before
9 the Mannheim Regional Court in Germany); *Broadcom Corp. v. Nintendo of Europe GmbH*, No.
10 7 O 62/18 (filed on May 25, 2018 before the Mannheim Regional Court in Germany); *Avago*
11 *Techs. Int'l Sales Pte. Ltd. v. Nintendo of Europe GmbH*, No. 2 O 83/18 (filed on June 13, 2018
12 before the Mannheim Regional Court in Germany); *Nintendo of Europe GmbH v. Avago Techs.*
13 *Int'l Sales Pte. Ltd.*, No. 4 Ni 20/19 (EP) joined with 4 Ni 27/19 (EP) (filed on July 9, 2018 before
14 the German Federal Patent Court in Munich, Germany); *Nintendo of Europe GmbH v. Avago*
15 *Techs. Int'l Sales Pte. Ltd.*, No. 6 Ni 35/18 (EP) (filed on July 6, 2018 before the German Federal
16 Patent Court in Munich, Germany); consequent appeals before the Court of Appeal and Federal
17 Court of Justice. If the Receiving Party intends to use Protected Material for any other German
18 infringement or nullity actions not enumerated above and in which the EP 1,177,531; EP
19 1,260,910; EP 1,385,339; and EP 1,365,385 patents are at issue, the Receiving Party shall give
20 reasonable advance notice to the Producing Party identifying the Protecting Materials and shall
21 meet and confer to ensure the protections provided for in provisions 6.6 “Procedures for Approving
22 or Objecting to Disclosure of Protected Material” and 6.7 “Use of Protected Material” are complied
23 with in the handling of the Protected Material.

24 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
25 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule

1 of Civil Procedure 26(c). A Producing Party may designate any Discovery Material as
2 “CONFIDENTIAL” if it contains or reflects confidential, proprietary, and/or commercially
3 sensitive information.

4 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
5 well as their support staff).

6 2.4 Designating Party: a Party that designates information or items that it produces in
7 disclosures or in responses to discovery as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL
8 – ATTORNEYS’ EYES ONLY.”

9 2.5 Discovery Material: all items or information, regardless of the medium or manner
10 in which it is generated, stored, or maintained (including, among other things, testimony,
11 transcripts, and tangible things), that are produced or generated in disclosures or responses to
12 discovery in this matter.

13 2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to
14 the litigation who has been retained by a Party or its Outside Counsel of Record to serve as an
15 expert witness or a litigation consultant in the Actions (including any necessary support personnel
16 of such person to whom disclosure is reasonably necessary for this litigation or the Actions), and
17 who is not a current employee of a Party or of a competitor of a Party, and who, at the time of
18 retention, is not anticipated to become an employee of a Party or of a competitor of a Party.

19 2.7 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or
20 Items: Discovery Material that contains or reflects information that is extremely confidential
21 and/or sensitive in nature and the Producing Party reasonably believes that the disclosure of such
22 Discovery Material is likely to cause economic harm or significant competitive disadvantage to
23 the Producing Party. The Parties agree that the following information, if non-public, shall be
24 presumed to merit the “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” designation:
25 trade secrets, pricing information, financial data, sales or marketing forecasts or plans, business

1 plans, sales or marketing strategy, product development information, engineering documents,
2 testing documents, employee information, and other non-public information of similar competitive
3 and business sensitivity. Provided, however, that the forgoing presumption applies only to
4 information originally created within the ten years prior to entry of this Protective Order.

5 2.8 House Counsel: attorneys (as well as their support staff) who are employees of the
6 Receiving Party and who have responsibility for managing the above-captioned case or the
7 Actions. House Counsel does not include Outside Counsel of Record or any other outside counsel.

8 2.9 Non-Party: any natural person, partnership, corporation, association, or other legal
9 entity not named as a Party to the above-captioned case or the Actions.

10 2.10 Outside Counsel of Record: attorneys who are not employees of a Party but are
11 retained to represent or advise a Party in connection with the above-captioned case or the Actions
12 and have entered an appearance on behalf of that Party in the above-captioned case or the Actions,
13 as well as other attorneys or support staff employed by or affiliated with the same firm as one of
14 the attorneys who has entered an appearance on behalf of one of the Parties in the above-captioned
15 case or the Actions, to whom it is reasonably necessary to disclose the information for the above-
16 captioned case or the Actions.

17 2.11 Party or Parties: Nintendo of America, Inc., Nintendo Technology Development,
18 Inc., Nintendo Software Technology Corporation, Broadcom Corporation, and Avago
19 Technologies International Sales Pte. Ltd., including all of their officers, directors, employees,
20 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

21 2.12 Producing Party: a Party or Non-Party that produces Discovery Material pursuant
22 to this protective order.

23 2.13 Professional Vendors: persons or entities that provide litigation support services
24 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
25 organizing, storing, or retrieving data in any form or medium) and their employees and

1 subcontractors. For the avoidance of doubt, Professional Vendors does not include professional
2 jury or trial consultants or mock jurors.

3 2.14 Protected Material: any Discovery Material that is designated as
4 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as
5 provided for in this Protective Order.

6 2.15 Receiving Party: a Party that receives Discovery Material from a Producing Party.

7 2.16 Relevant Technology: technology related to (a) graphics display systems for
8 processing and displaying video graphics; (b) bridge circuits in network devices; (c) computer
9 graphics systems for processing textures for a graphic image on a computer display; and (d)
10 systems for providing layered graphics in a video environment.

11 **3. SCOPE**

12 3.1 The protections conferred by this Protective Order cover not only Protected
13 Material (as defined above), but also (1) any information copied or extracted from Protected
14 Material; (2) all copies, excerpts, summaries, derivations or compilations of Protected Material;
15 and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal
16 Protected Material.

17 3.2 Nothing in this Protective Order shall prevent or restrict a Producing Party’s own
18 disclosure or use of its own Protected Material for any purpose, and nothing in this Protective
19 Order shall preclude any Producing Party from showing its Protected Material to an individual
20 who prepared the Protected Material. Notwithstanding the foregoing, a Producing Party may not
21 disclose its own Protected Material to the extent such Protected Material is also the Protected
22 Material of any other Party (*e.g.*, settlement discussions and agreements containing confidentiality
23 obligations), without the prior written consent of such other party, unless compelled to do so by a
24 Court of competent jurisdiction.

1 3.3 Nothing in this Protective Order shall restrict in any way the use or disclosure of
2 Discovery Material by a Receiving Party that is: (i) in the public domain at the time of disclosure
3 to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party
4 as a result of publication not involving a violation of this Protective Order, including becoming
5 part of the public record through trial or otherwise; (ii) known to the Receiving Party prior to the
6 disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the
7 information lawfully and under no obligation of confidentiality to the Designating Party; (iii)
8 previously produced, disclosed and/or provided by the Designating Party to the Receiving Party
9 or a Non-Party without an obligation of confidentiality and not by inadvertence or mistake; (iv)
10 with the consent of the Designating Party; or (v) pursuant to order of the Court.

11 3.4 Nothing in this Protective Order shall restrict a Producing Party's use or disclosure
12 of Discovery Material it produces that is designated as Protected Material by another Party or Non-
13 Party, if it was previously disclosed, produced, or provided by the Designating Party to the
14 Producing Party.

15 3.5 Nothing in this Protective Order shall be construed to preclude any Party's right to
16 seek to file any Protected Material with the Court under seal. This Protective Order is without
17 prejudice to the right of any Party to seek further or additional protection of any Discovery Material
18 or to modify this Protective Order in any way, including, without limitation, an order that certain
19 matter not be produced at all.

20 **4. DURATION**

21 4.1 Even after final disposition of the Actions, the confidentiality obligations imposed
22 by this Protective Order shall remain in effect until a Designating Party agrees otherwise in writing,
23 a court order otherwise directs, or that information otherwise becomes public. Final disposition
24 occurs after an order, mandate, or dismissal finally terminating the Actions with prejudice,
25 including all appeals.

1 **5. DESIGNATING PROTECTED MATERIAL**

2 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
3 or Non-Party that designates information or items for protection under this Order must take care
4 to limit any such designation to specific material that qualifies under the appropriate standards. To
5 the extent it is practical to do so, the Designating Party must designate for protection only those
6 parts of material, documents, items, or oral or written communications that qualify – so that other
7 portions of the material, documents, items, or communications for which protection is not
8 warranted are not swept unjustifiably within the ambit of this Order.

9 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
10 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
11 unnecessarily encumber or retard the case development process or to impose unnecessary expenses
12 and burdens on other parties) expose the Designating Party to sanctions.

13 5.2 Manner and Timing of Designations. The Producing Party may designate
14 Discovery Material with any of the following designations, provided that it meets the requirements
15 for such designations as provided for herein: “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL
16 – ATTORNEYS’ EYES ONLY.” Except as otherwise provided in this Protective Order (*see, e.g.,*
17 Section 5.2), or as otherwise stipulated or ordered, Discovery Material that qualifies for protection
18 under this Protective Order must be clearly so designated before the material is disclosed or
19 produced. Designation in conformity with this Protective Order requires:

20 (a) For information in documentary form (e.g., paper or electronically stored
21 information (“ESI”), but excluding transcripts of depositions or other pretrial or trial
22 proceedings), that the Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY
23 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” to each page that contains protected
24
25

1 material and also, for ESI, in the metadata field assigned to indicate the confidentiality
2 designation.¹

3 (b) A Party that makes original documents or materials available for inspection
4 need not designate them for protection until after the inspecting Party has indicated which
5 material it would like copied and produced. During the inspection and before the
6 designation, all of the material made available for inspection shall be deemed “HIGHLY
7 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has
8 identified the documents it wants copied and produced, the Producing Party must determine
9 which documents qualify for protection under this Protective Order. Then, before
10 producing the specified documents, the Producing Party must affix the appropriate legend
11 (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”)
12 as set forth in the preceding paragraph.

13 (c) For electronic files and documents produced in native electronic format,
14 that the Producing Party append to the file names or designators information indicating
15 whether the files contains “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
16 ATTORNEYS’ EYES ONLY” material, or shall use any other reasonable method for so
17 designating Protected Materials produced in electronic format. When electronic files or
18 documents are printed for use at deposition, in a court proceeding, or for provision in
19 printed form to an Expert, the party printing the electronic files or documents shall affix a
20 legend to the printed document corresponding to the designation of the Designating Party
21 and including the production number and designation associated with the native file.

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25¹ This protective order does not account for the provision of any source code, and the Parties agree that, to the extent production of source code is appropriate and required, a supplemental protective order with additional disclosure protections and procedures will be necessary.

(d) Each Party shall give the other Party notice if it reasonably expects a hearing or other proceeding to include the other Party's Protected Material so that the other Party can ensure that only authorized individuals are present at those proceedings.

(e) For all other information or tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the label "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY."

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Protective Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Protective Order. Following a correction of a designation, the Producing Party shall provide re-labeled copies of the information or items to each Receiving Party reflecting the change in designation.

6. ACCESS TO AND USE OF PROTECTED MATERIAL

6.1 Basic Principles. All Protected Material shall be used solely for the above-captioned case and the Actions, and not for any other purpose whatsoever, including without limitation any other litigation, patent prosecution or acquisition, patent reexamination or reissue proceedings, or any business or competitive purpose or function. Protected Material shall not be distributed, disclosed or made available to anyone except as expressly provided in this Protective Order or another Order of this Court. When the Actions have been terminated, the Receiving Party must comply with the provisions of Sections 4.1, 11.5 and 12 herein.

6.2 Duty to Object to Third Party Effort to Access in the Actions. After and to the extent a Receiving Party receives notice that a third party to the Actions is attempting to access Protected Material in the Actions, the Receiving Party will object to any attempt by a third party to access

1 any Protected Material submitted to the court in any Actions. After receiving notice, a Receiving
2 Party will promptly notify the Designating Party and its counsel of any attempt by a third party to
3 the Actions to access any such Protected Material from those proceedings, or of any attempt by
4 any third party to intervene in the Actions, in sufficient time to allow the Designating Party to
5 object, with the Receiving Party's assistance and the cooperation of the parties in the proceeding,
6 and to have such objection timely resolved by the German court to ensure adequate protections
7 remain in place.

8 6.3 Secure Storage, No Export. Nintendo believes that certain Protected Material may
9 be subject to U.S. government export control and economic sanctions laws. To the extent required
10 by such regulations or laws, including the U.S. Export Administration Regulations, Protected
11 Material must be stored and maintained by a Receiving Party at a location in the United States and
12 in a secure manner that ensures that access is limited to the persons authorized under this Order.
13 If Nintendo believes that any Discovery Materials may be subject to such export restrictions,
14 Nintendo shall notify in writing the Receiving Party and shall identify such materials by production
15 number and shall specify the legal and factual basis for such a belief, and respond in good faith to
16 any inquiries regarding such a belief. The Receiving Party shall be responsible for ensuring
17 compliance with all applicable U.S. export control and economic sanction laws.

18 6.4 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered
19 by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any
20 information or items designated "CONFIDENTIAL" only to:

21 (a) the Receiving Party's Outside Counsel of Record in the above-captioned
22 case or Outside Counsel of Record in the Actions who have signed the "Acknowledgment
23 and Agreement to Be Bound" (Exhibit A), as well as employees of said Outside Counsel
24 of Record in the above-captioned case or Outside Counsel of Record in the Actions, and
25 any copying or clerical litigation support services working at the direction of such Outside

1 Counsel of Record to whom it is reasonably necessary to disclose the information for this
2 litigation or the Actions;

3 (b) Three (3) or fewer House Counsel identified in accordance with Section 6.6
4 below prior to any disclosure, (1) to whom disclosure is reasonably necessary for this
5 litigation or the Actions, (2) who are not involved in competitive decision-making as
6 defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), on behalf
7 of a Party or a competitor of a Party, (3) who have signed the “Acknowledgment and
8 Agreement to Be Bound” (Exhibit A), as well as their support staff to whom disclosure is
9 reasonably necessary, provided that such support staff are not involved in competitive
10 decision-making and have signed the “Acknowledgment and Agreement to Be Bound”
11 (Exhibit A);

12 (c) Experts (as defined in this Protective Order) retained by the Receiving Party to
13 whom disclosure is reasonably necessary for this litigation provided that (1) such Expert
14 has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); (2) such
15 Expert has no involvement in competitive decision-making (as defined by *U.S. Steel v.*
16 *United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984)) for the Receiving Party; and (3)
17 no unresolved objections to such disclosure exist after proper notice has been given to all
18 Parties as set forth in Section 6.6;

19 (d) Professional Vendors to whom disclosure is reasonably necessary for this
20 litigation and who have signed the “Acknowledgment and Agreement to Be Bound”
21 (Exhibit A);

22 (e) the Court in the above-captioned case and the Actions and their respective
23 personnel;

(f) court reporters and their staff to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(g) the Designating Party or its employees, the author or recipient of a document containing the information, or a custodian or other person who otherwise possessed or knew the information; and

(h) any other person with the prior written consent of the Designating Party.

6.5 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"

Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

(a) the Receiving Party's Outside Counsel of Record in the above-captioned case or Outside Counsel of Record in the Actions who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), as well as employees of said Outside Counsel of Record, and any copying or clerical litigation support services working at the direction of such Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation;

(b) Experts (as defined in this Protective Order) of the Receiving Party or its Outside Counsel of Record, retained to assist in the above-captioned case or the Actions, provided that disclosure is only to the extent necessary to perform such work; and provided that: (1) such Expert has agreed to be bound by the provisions of the Protective Order by signing a copy of “Acknowledgment and Agreement to Be Bound” (Exhibit A); (2) such Expert is not involved in competitive decision-making, as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), on behalf of a Party or a competitor of a

1 Party; and (3) no unresolved objections to such disclosure exist after proper notice has been
2 given to all Parties as set forth in Section 6.6.

3 (c) Professional Vendors to whom disclosure is reasonably necessary for this
4 litigation and who have signed the “Acknowledgment and Agreement to Be Bound”
5 (Exhibit A);

6 (d) the court in the above-captioned case and the Actions and their respective
7 personnel;

8 (e) court reporters and their staff to whom disclosure is reasonably necessary
9 for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound”
10 (Exhibit A);

11 (f) the Designating Party or its employees, the author or recipient of a
12 document containing the information or a custodian or other person who otherwise
13 possessed or knew the information; and

14 (g) any other person with the prior written consent of the Producing Party.

15 6.6 Procedures for Approving or Objecting to Disclosure of Protected Material.

16 (a) Unless otherwise ordered by the Court or agreed to in writing by the
17 Designating Party, prior to disclosing any Protected Material to any person described in
18 Sections 6.4(b), 6.4(c), or 6.5(b) (referenced below as “Person”), the party seeking to
19 disclose such Protected Material first must make a written request to the Designating Party
20 that:

21 i. sets forth the full name of the Person and the city and state of his or
22 her residence, and

23 ii. states the present employer and the title of the Person;

24 iii. for any Expert, includes (a) an up-to-date curriculum vitae of the
25 Person (including the Person’s name and business/professional title and business

1 address); (b) a list of other cases in which the Person has testified (at trial or
2 deposition) within the last five (5) years; (c) a list of all companies by which the
3 Person has been employed within the last four (4) years, the dates of the
4 employment, and a brief description of the subject matter of the employment; and
5 (d) a list of all companies with which the Person has consulted within the last four
6 (4) years, the dates of the consultancy, and a brief description of the subject matter
7 of the consultancy. This paragraph does not require the Disclosing Party to disclose
8 aspects of any Expert's business or profession or companies with which the
9 proposed expert has consulted or by which the proposed expert has been employed
10 to the extent such information is subject to a non-disclosure agreement or other
11 legal or contractual confidentiality obligations by the expert to a third party; in any
12 such instance, the Disclosing Party will describe the confidential information /
13 experience in such a manner as to enable the other parties to determine whether any
14 valid concerns exist regarding the Disclosing Party's retention of that expert.

15 (b) Further, the Party seeking to disclose Protected Material shall provide such
16 other information regarding the Person's professional activities reasonably requested by
17 the Producing Party for it to evaluate whether good cause exists to object to the disclosure
18 of Protected Material to the Person.

19 (c) A Party that makes a request and provides the information specified in
20 Sections 6.6(a) and 6.6(b) may disclose the subject Protected Material to the identified
21 Person unless, within seven (7) days of delivering the request and providing all the
22 information required to be disclosed by this section, the Party receives a written objection
23 from the Designating Party. Any such objection must be in writing and set forth good cause
24 for the objection. For purposes of this section, "good cause" shall include an objectively
25 reasonable concern that the Person will, advertently or inadvertently, use or disclose

1 Protected Materials in a way or ways that are inconsistent with the provisions contained in
2 this Protective Order. In the absence of an objection at the end of the seven (7) day period,
3 the Person shall be deemed approved under this Protective Order. There shall be no
4 disclosure of Protected Material to the Person prior to expiration of this seven (7) day
5 period.

6 (d) A Party that receives a timely written objection must meet and confer with
7 the Designating Party (through direct voice-to-voice dialogue; other forms of
8 communication are not sufficient) to try to resolve the matter by agreement within seven
9 (7) days of the written objection. If no agreement is reached, the Party seeking to make the
10 disclosure to the Person may file a motion as provided in Civil Local Rule 7-1 (or otherwise
11 according to the Court's discovery dispute resolution procedures) seeking permission from
12 the Court to do so. Any such motion must describe the circumstances with specificity, set
13 forth in detail the reasons why the disclosure to the Person is reasonably necessary, assess
14 the risk of harm that the disclosure would entail, and suggest any additional means that
15 could be used to reduce that risk. In addition, any such motion must be accompanied by a
16 competent declaration describing the Parties' efforts to resolve the matter by agreement
17 (i.e., the extent and the content of the meet and confer discussions) and setting forth the
18 reasons advanced by the Designating Party for its refusal to approve the disclosure.

19 (e) In any such proceeding, the Party opposing disclosure to the Person shall
20 bear the burden of proving that the risk of harm that the disclosure would entail (under the
21 safeguards proposed) outweighs the Receiving Party's need to disclose the Protected
22 Material to the relevant Person.

23 (f) Upon receipt, a Receiving Party shall provide the Designating Party with a
24 copy of each signed "Acknowledgment and Agreement to Be Bound" (Exhibit A)
25 referenced herein.

1 6.7 Use of Protected Material. Any Protected Material may be introduced or submitted
2 during one or more of the Actions only if the Receiving Party takes reasonable steps and makes
3 all reasonable confidentiality requests to the court that are available under German procedural law
4 to protect the confidentiality of such Protected Material, including: (a) in the case of written
5 submissions, requesting that the German court exclude any Protected Materials from any third
6 party access to the court files and to keep them separate from other submissions in the Actions; (b)
7 in the case of written submissions, redacting, to the extent reasonably possible, any Protected
8 Material, and requesting that only the persons permitted access to such Protected Material under
9 this Protective Order are the recipients of such information; (c) in the case of a Receiving Party
10 that requests inspection of the court file in any Action, ensuring that Receiving Party's outside
11 counsel and any others retained or employed by Receiving Party who may receive access to
12 Protected Material as a result of such request have signed the "Acknowledgment and Agreement
13 to Be Bound" (Exhibit A); and (d) requesting that the German court seal the courtroom from the
14 public, including the Party representatives who are not permitted access to Protected Material
15 under this Protective Order, during those portions of court hearings when the Protected Material
16 is to be discussed, and to the extent reasonably practicable, otherwise referring to citations to the
17 written record for Protected Material during court proceedings in lieu of the content of Protected
18 Material where members of the public or others are present who are not permitted access to
19 Protected Material.

20 6.8 Patent Prosecution Bar. Absent the written consent of the Producing Party, any
21 person who reviews "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" information
22 shall not be involved, directly or indirectly, in any of the following activities for a Party: (i)
23 advising on, consulting on, preparing, prosecuting, drafting, editing, and/or amending of patent
24 applications, specifications, claims, and/or responses to office actions, or otherwise affecting the
25 scope of claims in patents or patent applications relating to Relevant Technology, before any

1 foreign or domestic agency, including the United States Patent and Trademark Office; and (ii) the
2 acquisition of patents (including patent applications), or the rights to any such patents or patent
3 applications with the right to sublicense, relating to Relevant Technology. To avoid any doubt,
4 activities subject to the Patent Prosecution Bar as used in this paragraph does not include
5 representing a Party in a post-grant validity proceeding before a domestic or foreign agency
6 (including, but not limited to, a reissue protest, *ex parte* reexamination or *inter partes*
7 reexamination, or other invalidity-related proceedings in other jurisdictions, such as “nullity”
8 actions in Germany). This Prosecution Bar shall only apply to information that is technical in
9 nature, relates to current or anticipated products, and that is designated as “HIGHLY
10 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” The Prosecution Bar shall not apply to
11 financial or other non-technical information disclosed by a Producing Party and designated as
12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or to information that is originally
13 created more than ten years prior to the entry of this Protective Order. Any information the
14 Producing Party contends should be subject to the Prosecution Bar must be separately labeled
15 “SUBJECT TO PROSECUTION BAR.” This Prosecution Bar shall begin when the affected
16 individual first reviews “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
17 information and shall end two (2) years after final disposition of the Actions.

18 6.9 Development Bar. Absent the written consent of the Producing Party, any person
19 who receives access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
20 information shall not be involved in performing hardware or software development work or
21 product development work directly or indirectly intended for commercial purposes relating to
22 Relevant Technology. This Development Bar shall only apply to information that is technical in nature,
23 relates to current or anticipated products, and that is designated as “HIGHLY CONFIDENTIAL –
24 ATTORNEYS’ EYES ONLY.” The Development Bar shall not apply to financial or other non-technical
25 information disclosed by a Producing Party and designated as “HIGHLY CONFIDENTIAL –

1 ATTORNEYS' EYES ONLY" " or information that is originally created more than ten years prior to
2 the entry of this Protective Order. Any information the Producing Party contends should be subject to
3 the Development Bar must be separately labeled "SUBJECT TO DEVELOPMENT BAR." These
4 prohibitions shall begin when the affected individual first reviews "HIGHLY CONFIDENTIAL –
5 ATTORNEYS' EYES ONLY" materials and until two (2) years after final disposition of the
6 Actions.

7 **7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
8 OTHER LITIGATION**

9 7.1 If a Party is served with a subpoena or a court order issued by any court, arbitral,
10 administrative, or legislative body that compels disclosure of any information or items designated
11 pursuant to this protective order as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
12 ATTORNEYS' EYES ONLY," that Party must:

13 (a) promptly notify in writing the Designating Party. Such notification shall
14 include a copy of the subpoena or court order;

15 (b) promptly notify in writing the party who caused the subpoena or order to
16 issue in the other litigation that some or all of the material covered by the subpoena or order
17 is subject to this Protective Order. Such notification shall include a copy of this Protective
18 Order; and

19 (c) cooperate with respect to all reasonable procedures sought to be pursued by
20 the Designating Party whose Protected Material may be affected. If the Designating Party
21 timely seeks a protective order, the Party served with the subpoena or court order shall not
22 produce any information designated pursuant to this protective order as
23 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
24 before a determination by the court from which the subpoena or order issued, unless the
25 Party has obtained the Designating Party's permission. The Designating Party shall bear

1 the burden and expense of seeking protection in that court of its material designated as
2 **CONFIDENTIAL**,” “**HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY**.”
3 Nothing in this Protective Order should be construed as authorizing or encouraging a
4 Receiving Party in the above-captioned case or the Actions to disobey a lawful directive
5 from another court or any arbitral, administrative, or legislative body.

6 **8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

7 8.1 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
8 Protected Material to any person or in any circumstance not authorized under this Protective Order,
9 the Receiving Party must immediately (a) notify in writing the Designating Party of the
10 unauthorized disclosures and provide to such counsel all known relevant information concerning
11 the nature and circumstances of the disclosure, (b) use its best efforts to retrieve improperly
12 disclosed Protected Material, (c) inform the person or persons to whom unauthorized disclosures
13 were made of all the terms of this Protective Order, and (d) request such person or persons to
14 execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

15 **9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
16 PROTECTED MATERIAL**

17 9.1 When a Producing Party gives notice to Receiving Parties that certain inadvertently
18 produced material is subject to a claim of privilege or other protection, the obligations of the
19 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). Any
20 inadvertent production of privileged or otherwise protected material that satisfies Federal Rule of
21 Evidence 502(b) shall not be deemed to have waived the privilege or protection.

22 9.2 Nothing herein shall prevent the Receiving Party from preparing a record for its
23 own use containing the date, author, addresses, and topic of the inadvertently produced Discovery
24 Material and such other information as is reasonably necessary to identify the Discovery Material
25 and describe its nature to the Court in any motion to compel production of the Discovery Material.

1 **10. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

2 10.1 Timing of Challenges. Any Party may challenge a designation of confidentiality at
3 any time. Unless a prompt challenge to a Designating Party's confidentiality designation is
4 necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a
5 significant disruption or delay of the litigation, a Party does not waive its right to challenge a
6 confidentiality designation by electing not to mount a challenge promptly after the original
7 designation is disclosed.

8 10.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process
9 by providing written notice of each designation it is challenging and describing the basis for each
10 challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must
11 recite that the challenge to confidentiality is being made in accordance with this specific paragraph
12 of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must
13 begin the process by conferring directly (in voice to voice dialogue; other forms of communication
14 are not sufficient) within 7 days of the date of service of notice. In conferring, the Challenging
15 Party must explain the basis for its belief that the confidentiality designation was not proper and
16 must give the Designating Party an opportunity to review the designated material, to reconsider
17 the circumstances, and, if no change in designation is offered, to explain the basis for the chosen
18 designation. A Challenging Party may proceed to the next stage of the challenge process only if it
19 has engaged in this meet and confer process first or establishes that the Designating Party is
20 unwilling to participate in the meet and confer process in a timely manner.

21 10.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
22 intervention, the Designating Party shall file and serve a motion to retain confidentiality under
23 Civil Local Rule 7 (or the Court's procedures for resolving discovery disputes and in compliance
24 with Civil Local Rule 79-5, if applicable) within 21 days of the initial notice of challenge or within
25 14 days of the parties agreeing that the meet and confer process will not resolve their dispute,

1 whichever is earlier. Each such motion must be accompanied by a competent declaration affirming
2 that the movant has complied with the meet and confer requirements imposed in the preceding
3 paragraph. Failure by the Designating Party to make such a motion including the required
4 declaration within 21 days (or 14 days, if applicable) shall automatically waive the confidentiality
5 designation for each challenged designation. In addition, the Challenging Party may file a motion
6 challenging a confidentiality designation at any time if there is good cause for doing so, including
7 a challenge to the designation of a deposition transcript or any portions thereof. Any motion
8 brought pursuant to this provision must be accompanied by a competent declaration affirming that
9 the movant has complied with the meet and confer requirements imposed by the preceding
10 paragraph.

11 The burden of persuasion in any such challenge proceeding shall be on the Designating
12 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose
13 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
14 sanctions. Similarly, frivolous assertions of confidentiality protections and those made for an
15 improper purpose (e.g., to harass or impose unnecessary expenses and burdens on other parties)
16 may expose the Designating Party to sanctions. Unless the Designating Party has waived the
17 confidentiality designation by failing to file a motion to retain confidentiality as described above,
18 all parties shall continue to afford the material in question the level of protection to which it is
19 entitled under the Producing Party's designation until the court rules on the challenge.

20 **11. MISCELLANEOUS**

21 11.1 Operability of This Protective Order. This Protective Order supersedes all prior
22 orders regarding the disclosure of protected materials.

23 11.2 Right to Further Relief. Nothing in this Protective Order abridges the right of any
24 person to seek its modification by the Court in the future. By stipulating to this Protective Order,
25

1 the Parties do not waive the right to argue that certain material may require additional or different
2 confidentiality protections than those set forth herein.

3 11.3 Right to Assert Other Objections. By stipulating to the entry of this Protective
4 Order, no Party waives any right it otherwise would have to object to disclosing or producing any
5 information or item on any ground not addressed in this Protective Order. Similarly, no Party
6 waives any right to object on any ground to use in evidence of any of the material covered by this
7 Protective Order. This Protective Order shall not constitute a waiver of the right of any Party to
8 claim in the Actions or otherwise that any Discovery Material, or any portion thereof, is privileged
9 or otherwise non-discoverable, or is not admissible in evidence in the Actions or any other
10 proceeding.

11 11.4 Filing Protected Material. A Party that seeks to file under seal any Protected
12 Material with the Court must comply with Civil Local Rule 79-5. The standards and procedures
13 outlined in Civil Local Rule 79-5 apply in all respects as to filing of materials designated under
14 this Protective Order.

15
16 11.5 Burdens of Proof. Notwithstanding anything to the contrary above, nothing in this
17 Protective Order shall be construed to change the burdens of proof or legal standards applicable in
18 disputes regarding whether particular Discovery Material is confidential, which level of
19 confidentiality is appropriate, whether disclosure should be restricted, and if so, what restrictions
20 should apply.

21 11.6 Discovery Rules Remain Unchanged. Nothing herein shall alter or change in any
22 way the discovery provisions of the Federal Rules of Civil Procedure, the Local Rules for the
23 United States District Court for Northern District of California, or the Court's own orders.
24 Identification of any individual pursuant to this Protective Order does not make that individual
25 available for deposition or any other form of discovery outside of the restrictions and procedures

1 of the Federal Rules of Civil Procedure, the Local Rules for the United States District Court for
2 Northern District of California, or the Court's own orders.

3 **12. FINAL DISPOSITION**

4 12.1 Unless otherwise ordered or agreed in writing, within 90 days after the final
5 disposition of the Actions, as defined in Section 4.1, the Receiving Party, including Outside
6 Counsel for the Receiving Party, shall destroy or return all Protected Material, including Protected
7 Material included in work product, pleadings, motion papers, legal memoranda, correspondence,
8 trial transcripts and trial exhibits admitted into evidence ("derivations"), with the exception that
9 the obligation to destroy all copies of such Discovery Material shall not extend to copies stored in
10 disaster recovery backups or other data sources that are not reasonably accessible. As used in this
11 subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and
12 any other format reproducing or capturing any of the Discovery Material. Whether the Discovery
13 Material is returned or destroyed, the Receiving Party must submit a written certification to the
14 respective outside counsel of the Producing Party (and, if not the same person or entity, to the
15 Designating Party) by the 90 day deadline that (a) identifies (by category, where appropriate) all
16 the Protected Material that was returned or destroyed and (b) affirms that the Receiving Party has
17 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
18 capturing any of the Discovery Material. Notwithstanding this provision, Counsel are entitled to
19 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
20 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
21 product, and consultant and expert work product, even if such materials contain Protected Material.
22 Any such archival copies that contain or constitute Protected Material stored in disaster recovery
23 backups or other sources that are not reasonably accessible remain subject to this Protective Order
24 as set forth in Section 4.1.

1 12.2 The Court shall retain jurisdiction after final disposition of the above-captioned
2 case to hear and resolve any disputes arising out of this Protective Order.

3 **IT IS SO STIPULATED.**

4 DATED: November 15, 2019

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24 DATED: November 15, 2019

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11 INC., and NINTENDO SOFTWARE
12 TECHNOLOGY CORPORATION

13 **PURSUANT TO STIPULATION, IT IS SO ORDERED.**

14 DATED this 15th day of November, 2019.

15 
16

17 The Honorable Richard A. Jones
18 United States District Judge
19
20
21
22
23
24
25

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
or type full address], declare under penalty of perjury that I have read in its entirety and
understand the Protective Order and the Supplemental Protective Order Regarding Source Code
as issued by the United States District Court for the Western District of Washington in the
of *In re Ex Parte Application of Broadcom Corporation and Avago Technologies*
National Sales PTE. Limited for an Order Pursuant to 28 U.S.C. Section 1782, Case No. C19-
RAJ. I agree to comply with and to be bound by all the terms of this Protective Order and
Supplemental Protective Order Regarding Source Code and I understand and acknowledge that
to so comply could expose me to sanctions and punishment in the nature of contempt. I
only promise that I will not disclose in any manner any information or item that is subject to
Protective Order to any person or entity except in strict compliance with the provisions of this

I further agree to submit to the jurisdiction of the United States District Court for the Western District of Washington for the purpose of enforcing the terms of this Protective Order and the Supplemental Protective Order Regarding Source Code, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone number]
as my Washington agent for service of process in connection with this action or any proceedings
related to enforcement of this Protective Order.

Date:

Location where sworn and signed:

Printed name:

Signature: